IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 7TH MARCH 2007 / 16TH PHALGUNA 1928

CRL.A.No. 270 of 1998(A)

AGAINST THE ORDER DATED 26/03/1998 IN CC.12/1997 to 15/1997 of ENQUIRY COMMR. & SPL. JUDGE, TRIVANDRUM
.....

PETITONER/APPELLANT:

M.N.THYAGARAJAN,S/O.NARAYANAN VAIDYAN, BHARATHI BHAVAN,MOOTHEDATHU, JANARDHANAPURAM, VARKALA (FORMERLY CHAIRMAN OF MUNICIPAL COUNCIL,VARKALA).

BY ADV. SRI.V.N.ACHUTHA KURUP (SR.)

RESPONDENT/RESPONDENT:

STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07/03/2007 ALONG WITH CRA.NO.271 OF 1998 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, J.

Crl. Appeal Nos.270, 271, 272 & 273 of 1998

Dated this the 7th day of March, 2007

Judgment

These appeals are filed against the common judgment passed by the Enquiry Commissioner and Special Judge, Thiruvananthapuram in C.C. Nos.12 to 15 of 1997 convicting the appellant for the offence punishable under section 13 (2) read with section 13 (1) (d) of the Prevention of Corruption Act and also for the offence punishable under section 477-A of the Indian Penal Code.

2. Varkala Panchayat was converted as a Municipality in the year 1988 and election to the Municipality was conducted. Out of the 24 elected councillors, 12 belonged to one group called UDF and another 12 belonged to another group called LDF. Since both sides were having equal strength, selection to the Municipal Chairman was conducted by lot and appellant succeeded and he was elected as the Chairman from 9.2.1988. Among the LDF, there was an understanding that he will vacate the office after two years and one Chandrachoodan Nair, Vice Chairman will hold the office of Chairman for another period of two years and for the remaining period of one year, Advocate Pushpangadan,

another councillor will hold the office of Chairman. It is the case of the appellant that during the tenure of the appellant, an All India Exhibition was organised by the Municipality and as directed by the District Congress Committee, he continued for more than two years against the displeasure of the Vice Chairman. Here, several allegations were raised and a resolution was passed by the Municipal Council requesting the authorities concerned to enquire into the allegations. The allegation was that he defalcated money by way of T.A. Minutes books marked as Exts.P1 and P2 will show the resolution. Based upon the resolution a vigilance enquiry was conducted and the charges were laid. The allegation was that the accused who was the Chairman of Varkala Municipality for the period from 9.2.1988 to 5.4.1990 (two years, one month and 20 days) obtained undue pecuniary advantage to the tune of Rs.1,744.14 by making false tour notes and T.A. bills and also forging the respective entries in the log books of the departmental jeep KET 5789 of Varkala Municipality and using them as genuine documents. The court below found that the total amount lost to the Municipality was Rs.1,586.58.

3. A preliminary point was raised stating that the charge sheet itself was irregular. Ext.P4 is the FIR. Based on Ext.P4 FIR, four cases were registered. According to the allegations, he got the above money by manipulating 26 T.A. bills on 26 different dates. C.C.No.12 of 1997 contained offence with regard to six T.A. bills. C.C.No.13 of 1997 contains instance of defalcation of nine TA bills, C.C.No.14 of 1997 contained five TA bills and C.C.No.15 of 1997 contained six TA bills. It is the contention of that all the 26 instances are distinct and separate transactions and they cannot be clubbed together. Section 218 of the Code of Criminal Procedure states that every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately even though a common trial can be conducted at the request of the accused person, if the Magistrate is of the opinion that no such person is likely to be prejudiced. It is the case of the appellant that he is not questioning the common trial, but, he is questioning the charge based on each of the 26 distinct offence which cannot be charged in one group. Section 219 provides that when a person is accused of more offences than one of the same kind committed within the space of 12 months, three offences can

be clubbed together. Therefore, at the maximum, three offences of the same kind committed within an year can be charged together. Six or nine independent allegations, though of same kind, were charged together and there is pure illegality. It is also submitted that it is not a question of error in entering the particulars of the charge in detail or omission given under section 215 Cr.P.C. Even though this is one illegality, since the accused did not raise any such objection during trial regarding this matter and considering the nature of the case, no prejudice is caused to the accused. I am not interfering in the appeal on that technical ground.

4. It is further argued that questioning under section 313 was not done. Section 313 of Cr. P.C. gives a valuable right to the accused so that he will know the incriminating circumstances and effectively utilise the opportunities to examine the witnesses given under sections 232 and 233 of Cr. P.C., but, absence of 313 questioning will not vitiate the trial as such and, at the maximum, it will enable the accused for getting a remand. Further, even though 313 questioning is mandatory, the appellate court need not also remand the matter if no prejudice is caused actually (State (Delhi Administration) v. Dharampal

(2001 Crl.L.J.4748 SC = AIR 2001 SC 2924). It was argued that when incriminating parts of the offence are not put to the accused, such evidence shall be eschewed from consideration as held by the Apex Court in Kanhai Mishra v. State of Bihar ((2001) 3 SCC 451). This question can be considered after going through the merits of the case.

5. It is also seen that the crime was registered on the basis of investigation based on a resolution of the Municipality. The same Municipal council passed Ext.D1 resolution stating that the Municipal Council considered the documents in detail and found that there is no cause for such allegations and earlier resolution was passed on a misapprehension and, therefore, the Municipal council passed unanimous resolution to withdraw the earlier resolution. Even then the question is whether the charges levelled against the appellant is proved in this case on the basis of evidence.

6. PWs 1 and 2 are councillors from Ward Nos.18 and 14. Their evidence proved that appellant was the Chairman of the Varkala Municipal Council during the relevant period. PW1 also proved Exts.P1 to P3 minutes books and Exts.P1 (a), P2 (a) to P2 (s) and P3 (a) to P3 (f) minutes of the council meeting. He categorically

stated that the minutes book is not signed by the councillors, but, it is signed only by the Chairman and he proved the signature of the accused in those minutes books. He also stated that the minutes are written by the clerk. It will be written by the clerk before the next council meeting. He deposed as follows:

He again deposed in cross-examination that minutes are not written during the council meeting. He also deposed that usually meetings will not be started at the correct time mentioned in the notice. He also deposed that during the end of 1988 and at the beginning of 1999, an exhibition was conducted at Sivagiri and during that time, occasionally, the Chairman had to go to Thiruvananthapuram twice a day and some of the councillors were against the conduct of the exhibition. He also deposed that Ext.D1 resolution was passed after convincing that no defalcation was committed by the appellant and the earlier resolution for conducting enquiry was passed on the basis of a mistaken understanding. He also deposed that in certain days, meetings were held after the appellant came back from

Thiruvananthapuram. He further deposed that in certain meetings held during the exhibition days, he as well as the Chairman had to go out of the meeting before the formal end of the council meeting, but, that is not recorded in the minutes. Evidence of PW1 will only show that he is supporting the appellant. His evidence, in no way, supports the prosecution. Merely because TA bill was drawn for going to Thiruvananthapuram on the date of the council meeting, there is no impropriety and it was clearly explained by PW1. The explanation was that in certain days, appellant had to go to Thiruvananthapuram for urgent work and to come back before the council meeting starts and the council meeting will not start exactly at the time mentioned in the notice, but, will commence subsequently depending upon the convenience of the councillors even though minutes are recorded by the clerk as the meeting was conducted in time. Therefore, even if he goes before the meeting is over, that will not be recorded. Unlike the practice and as per the rules, minutes in this Municipality is not signed by the councillors in the meeting, but, only by the Chairman and that too is written by a clerk and signed subsequently before the next meeting. Exts.P1 to 3 series would show that none of the councillors signed the

above. PW2 only proved that the appellant was the Chairman of the council during the relevant period. PW3 is the investigating officer who registered the case. PW4 was the L.D. Clerk in the Varkala Municipality during the relevant period and she also proved Exts.P1 (a), P2(a) to P2 (q) minutes, Ext.P5 attendance register, Exts.P6 and P7 log books, Ext.P9 tour note and Exts.P8 and 10 to 20 T.A. bills of the accused and identified the signature of the accused therein. Ext.P9 is the tour note of the accused for the month of August, 1989 and Exts.P8 and P10 to 20 T.A. bills of the accused for the period from November, 1988 to March, 1990. She also deposed generally that there will be difference regarding the time of council meetings actually held and the time of meetings shown in the minutes book. PW6 UD clerk also proved the same. PW6 was the UD clerk during the period 1989-90. PW6 also stated that even in certain days, the appellant had gone outside immediately after starting the meeting, but, that is not mentioned in the minutes book. He deposed as follows:

This is the reason for the difference regarding the time noted in the minutes book and log books. The slight difference of time in the minutes book and the log books is taken for holding that the accused did not conduct journey on that particular day or did not spend six hours in a particular station, in this case Thiruvananthapuram, to enable him to get D.A. of Rs.20/-. If the time is little lesser than six hours according to log book and minutes compared to tour notes concerned have been produced. Because of the difference of time in the aforesaid books, it can be stated that he did not even travel or did not spend six hours in Thiruvananthapuram. The prosecution relied on the evidence of PW4 that TA bills were prepared on the basis of the tour note prepared by the accused, but, in this case, only one tour note was produced as Ext.P9 and that was for the month of August, 1998. There is no charge or allegation that the accused has drawn excess TA during that period or there was no allegation that the accused has fabricated the entries in Ext.P9. None of the tour notes prepared by the accused with regard to the relative period was proved. Thus, the main documents to prove the allegation that TA bills were prepared on the basis of tour note by the accused were not produced. Further, PW6 also

deposed that TA bills were considered and passed in the council meeting. PW6 deposed as follows:

The only other evidence relied on by the prosecution is the discrepancy in the TA bills which were produced. It is stated that after considering the very same alleged forged log books driver was paid TA and there is no allegation regarding the same. Driver was also not examined. Merely because there is discrepancy in the TA bill and log books, it cannot be stated that the appellant has drawn TA without approval. As explained by the prosecution witnesses itself that the exact time of council meeting is not mentioned in the minutes book and appellant had to go to Thiruvananthapuram and come back during the dates of the the council meeting. If the tour notes prepared by the appellant were proved, the matter would have been very clear, but, that important piece of evidence was suppressed by the prosecution. Here, the TA bills were passed in the council and after verification nothing was found wrong. Since procedure for holding the meeting, writing of the minutes and necessity for the appellant to go to

Thiruvananthapuram are known to the council and if there are any discrepancies, council would not have passed the TA bills. On going through the evidence, I am of the opinion that prosecution was not able to prove conclusively that the appellant has gained undue pecuniary advantage to the tune of Rs.1,586.58 by making false tour notes and TA bills and forging the respective entries in the log book while he was the Chairman of Varkala Municipality. I am also of the opinion that from the evidence available in the case, it cannot be stated that the appellant is guilty of the offence charged. Hence, I am not further considering the nature of the legality of the charge or impropriety of the procedure in not being questioned under section 313 (d) of Cr. P.C. in this appeal. Since prosecution has failed to prove the charge beyond reasonable doubt, the conviction and sentence passed on the appellant are set aside and the appeals are allowed.

J.B. KOSHY
(JUDGE)

vaa

J.B.Koshy, J.

**Crl. A. Nos.270, 271,
272 & 278 of 1998**

Judgment

7-3-2007